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QUESTIONS PRESENTED

1. Did the California Supreme Court affirm the death judgment by relying on facts outside the record and without affording petitioner an opportunity to confront and brief the points, thereby violating due process and resulting in an arbitrary and capricious penalty determination?

2. Can California's Death Penalty statute reasonably be viewed as "vague" under Stringer v. Black?[1/]

3. Is certiorari warranted because of petitioner's claim that he was deprived of his constitutional rights due to the use of courtroom restraints?

4. Is certiorari warranted based on petitioner's assertion that his trial counsel's representation was inadequate?

1. Stringer v. Black, 503 U.S. ___, 112 S.Ct. 1130, 117 L. Ed. 2d 367 (1992).

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No. 93-5131

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1992

PAUL PALALAUA TUILAEPA, Petitioner,

v.

STATE OF CALIFORNIA, Respondent.

On Petition for Writ of Certiorari
To the Supreme Court of California

BRIEF OF RESPONDENT IN OPPOSITION

OPINION BELOW

Petitioner, Paul Palalaua Tuilaepa, in forma pauperis, seeks review of the California Supreme Court's decision affirming his conviction and judgment of death in an opinion published as People v. Tuilaepa, 4 Cal. 4th 569, 842 P.2d 1142, 14 Cal. Rptr. 2d 340 (1992). A copy of the opinion is attached as Appendix A to petitioner's Petition for Writ of Certiorari.

JURISDICTION

Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Petitioner relies upon the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, pertinent parts of which are set forth at page 2 of the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

Petitioner was sentenced to death under the 1978 California Death Penalty Law following a jury trial in which petitioner was convicted of first degree murder, six counts of robbery, one count of attempted robbery, and two counts of assault with a firearm, and in which the jury found true a special circumstance[2] allegation that the murder occurred during the commission of a robbery. Cal. Penal Code § 190.2(a)(17)(i). On automatic appeal, the California Supreme Court affirmed the judgment and the penalty in its entirety. People v. Tuilaepa, 4 Cal. 4th 569, 842 P.2d 1142, 14 Cal. Rptr. 2d 340 (1992). A Petition for Writ of Habeas Corpus is currently pending in the California Supreme Court.[3]

STATEMENT OF FACTS

Petitioner's actions late in the afternoon of October 6, 1986, formed the basis for his murder, attempted robbery, robbery, and assault with a firearm convictions, and for the jury's findings that he murdered Melvin Whiddon in the course of robbery, and inflicted great bodily injury upon robbery victim Bruce Monroe and assault victims Kelvin Whiddon and Kenneth

2. A California defendant is not death-eligible absent a finding by the jury or trial judge, where a jury is waived, of one of a number of enumerated "special circumstances" listed in California Penal Code § 190.2.

3. The issue of courtroom shackling, which is raised by petitioner in three of his four arguments, infra, is raised by petitioner in the pending Petition for Writ of Habeas Corpus in the California Supreme Court.

Boone.[4] Clerk's Transcript on Appeal (hereinafter CT) at 208-12. At about 5:30 p.m. on October 6, 1986, as people gathered to watch Monday Night Football at the Wander Inn Bar in Long Beach, petitioner came in with a cohort. Petitioner screamed and pointed a rifle in the bartender's face, demanding money. Reporter's Transcript on Appeal (hereinafter RT) at 458-60.

Petitioner robbed six people at the bar and attempted to rob another bar patron. He shot and killed Melvin Whiddon, and shot and seriously wounded Whiddon's twin brother, Kelvin. Kelvin, who staggered to his brother's side and witnessed his brother's last breath, was in intensive care after petitioner's bullet went through Kelvin's side and a lung and exited by his spine. Petitioner shot Bruce Monroe in the stomach, after he turned his rifle toward Monroe's wife and Monroe stood in front of her. The bullet tore a hole through Monroe's kidney, liver, and an artery of his heart. The bullet then lodged against Monroe's spine and could not be removed. At trial, Monroe still wore a colostomy bag and lacked feeling in the top of his legs. As petitioner approached the back door of the bar, he looked at Kenneth Boone and smiled. He then aimed his rifle and shot Boone through the neck. The bullet struck Boone and exited the left side of his head. RT 460-532.

4. Respondent also refers this Court to the opinion of the California Supreme Court which thoroughly summarizes the facts developed at the guilt and penalty phases of petitioner's trial. Tuilaepa, 4 Cal. 4th at 577-81, 842 P.2d at 1145-48, 14 Cal. Rptr. 2d at 841.

At the penalty phase of petitioner's trial, the People introduced evidence of assaults, threats, and the possession of possible weapons while petitioner was at California Youth Authority, and of a robbery and assault committed by petitioner on August 3, 1987, while trial was ongoing in this case. RT 720-806.

Petitioner's penalty phase evidence consisted of the testimony of his mother, Meanoa Tuilaepa, his sister, Sanita Toufuli, and of clinical psychologist Michael Maloney. Petitioner's mother testified that petitioner, who was the youngest of 12 children all of whom were born in American Samoa, had been a "good boy" around the house and had done well in school. The family lived in Hawaii and then Long Beach, where petitioner, when he was about 15, met friends who were a "bad influence." Petitioner had helped take care of his brother Joe, who was in a wheelchair and lived at home because he had been shot in the back at a party. Petitioner's mother had tried, to the best of her ability, to teach petitioner right from wrong and the value of human life. Petitioner's sister testified that she and other relatives loved petitioner and were in court to support him. RT 808-21.

Clinical psychologist Michael Maloney gave petitioner a number of psychological tests, and testified that petitioner did not appear to be grossly disturbed, although he did appear to be depressed. His IQ was probably in the low 70's, placing him in the bottom five percent of the population. He had no neurologi-

cal disabilities and had sufficient intelligence to know right from wrong. RT 824-30.

SUMMARY OF REASONS WHY THE PETITION SHOULD BE DENIED

First, the California Supreme Court did not base its affirmance of the death judgment by relying on facts outside the trial record or denying petitioner an opportunity to confront and brief issues as to courtroom shackling. The reason the court rejected petitioner's appellate argument as to courtroom shackling was that petitioner failed to object and make a record as to this issue at trial, thereby waiving the claim on appeal. Tuilaepa, 4 Cal. 4th at 583-86, 842 P.2d 1142, 14 Cal. Rptr. 2d 340.

Second, California's 1978 Death Penalty Statute, namely California Penal Code § 190.3, is not vague in respect to factor (a), which refers to the circumstances of the crime, factor (b), which refers to petitioner's other violent criminal activity, and factor (i), which refers to the age of the defendant. California's death penalty scheme contains no factors which are vague such as the Mississippi factors found to be vague in Stringer v. Black, 503 U.S. ___, 112 S.Ct. 1130, 117 L. Ed. 2d 367 (1992). Even if applicable to California's penalty phase "aggravating factors," the reasoning of Stringer is inapposite to the instant case because factors (a), (b) and (i) direct the jury to specific and commonly understandable facts about petitioner

and his crime such that they are not "illusory" or impermissibly vague.

Third, even aside from the fact that the California Supreme Court rejected petitioner's shackling claim on the ground that he failed to object to the use of physical restraints, thereby waiving the claim, the trial record did not establish that the jury could see petitioner's restraints, and no prejudice was shown even assuming some jurors may have briefly caught a glimpse of ankle shackles as petitioner entered the courtroom.

Lastly, petitioner has made only a cursory assertion that his trial counsel's representation was inadequate, a claim which, as previously noted, is the subject of a pending Petition for Writ of Habeas Corpus in the California Supreme Court.

ARGUMENT

I

THE CALIFORNIA SUPREME COURT DID NOT BASE ITS AFFIRMANCE OF THE DEATH JUDGMENT AS TO THE ISSUE OF COURTROOM SHACKLING ON FACTS OUTSIDE THE RECORD OR DENY PETITIONER AN OPPORTUNITY TO BRIEF THE ISSUE

Petitioner contends that on the issue of whether there was justification for shackling at trial, the California Supreme Court relied upon declarations submitted by respondent in its response to the Petition for Writ of Habeas Corpus currently pending before the California Supreme Court, yet ignored evidence presented by petitioner by refusing to take judicial notice of two juror declarations on the question of whether jurors at trial could see petitioner in restraints. He concludes that this was an arbitrary and unusual deprivation of his ability to prosecute a meaningful appeal. Petition at 6-9. Petitioner's contention is without merit.

It is critical to note that although petitioner contends that the California Supreme Court resolved the shackling issue by relying on facts outside the trial record, in fact the court rejected the claim on the threshold basis that petitioner had failed to object at trial, thereby waiving the claim. Tuilaepa, 4 Cal. 4th at 583, 842 P.2d 1142, 14 Cal. Rptr. 2d 340.

It was upon this basis, founded solely upon facts within the record, that the California Supreme Court resolved the issue.

Thereafter, when addressing the predictable ineffective assistance of counsel claim based on trial counsel's failure to object, the California Supreme Court noted that (1) nothing in the record clearly established that the jury did or could see any restraints, (2) a post-trial record settlement hearing revealed that efforts had been taken to conceal ankle shackles from the jury whenever petitioner appeared in court, and (3) even assuming the jurors may have glimpsed petitioner in restraints as he entered the courtroom, this could not have shocked them or affected their assessment of the evidence. Tuilaepa, 4 Cal. 4th at 583-85, 842 P.2d 1142, 14 Cal. Rptr. 2d 340. In short, the notion that the court resolved the shackling issue by relying upon facts outside the trial record is simply incorrect. As such, petitioner's assertion that he did not have the opportunity to confront important points on the shackling issue because the court came to its conclusion by relying upon facts outside the record is groundless.

Moreover, the California Supreme Court reasonably refused to take judicial notice of two juror declarations on the question of the extent to which jurors may have glimpsed petitioner entering the courtroom in restraints. These matters were not the proper subject of judicial notice under California Evidence Code § 452(h), because the facts asserted in the declarations as to what jurors may have seen were subject to

dispute. Also, such documents are most appropriately considered in the Petition for Writ of Habeas Corpus currently pending before the California Supreme Court, as they are beyond the "four corners" of the trial record.

Lastly, it is unclear exactly what evidence "outside the record" petitioner claims was considered by the California Supreme Court. Petitioner claims that "the court refused to take judicial notice of petitioner's declarations but, [sic] incredibly relied upon statements in respondent's declarations which were neither before the court nor the subject of a judicial notice request. In fact the respondent did not want then [sic] before the court in the appeal. (Appendix A: 7, n.4.)" Petition at 7. It appears that petitioner is referring to page 17 rather than page 7 of the California Supreme Court's slip opinion, which petitioner attached to his petition as Appendix A. However, at that point in the opinion the court merely explained that it was refusing to grant petitioner's request to take judicial notice of two juror declarations, in part because the declarations were subject to dispute and thus were not the proper subject of judicial notice under California Evidence Code § 452(h). In that vein, the court was merely noting the disagreements between the declarants, as well as discrepancies between these declarations on the one hand and facts remembered by the court and counsel at the post-trial record correction and settlement hearing. The court was not ruling on the shackling issue. People v. Tuilaepa, 4 Cal. 4th at 595, 842 P.2d at 1152, 14 Cal. Rptr. 2d at 841.

Petitioner claims that the California Supreme Court quoted from trial counsel's declaration submitted by respondent in response to the Petition for Writ of Habeas Corpus currently pending before the California Supreme Court. Petition at 7-8. At most, however, petitioner has highlighted a factual error which was without significance to the resolution of the present case. As previously noted, the California Supreme Court decided the shackling issue in the first instance on the basis of petitioner's failure to object at trial to the use of courtroom restraints. The court did not decide the issue on the factual basis of counsel's recollections after trial as to the reasons for the use of courtroom restraints or their visibility to jurors.

Further, the factual error, in and of itself, consists of the following: While the evidence elicited at the post-trial hearing indicated that trial counsel recalled petitioner being a member of a gang called the "Sons of Samoa," recalled some mention of him being affiliated with the "East Side Longo" gang at one time, and recalled some concern with members of petitioner's family, including his brother, being present in court during the proceedings, RST 1018-19, the California Supreme Court's opinion recounted that counsel recalled "that defendant was thought to be dangerous and a flight risk during trial because he and a brother in attendance were gang members." Tuilaepa, 4 Cal. 4th at 582, 842 P.2d at 1149, 14 Cal. Rptr. 2d at 841. As noted earlier, neither this factual issue nor any

discrepancy underlying this question was the basis for the California Supreme Court's resolution of this issue. In fact, the California Supreme Court referred to trial counsel's recollection not in its analysis and disposition of the shackling issue, but rather in its "background" section preceding its analysis. Tuilaepa, 4 Cal. 4th at 582, 842 P.2d at 1149, 14 Cal. Rptr. 2d at 841. In short, the aspect of the California Supreme Court's disposition of the shackling issue to which petitioner refers is not factually significant, and most importantly it was not, in any event, the basis of the court's resolution of the matter.

In summary, petitioner's contention lacks merit. The California Supreme Court did not err, any assumed error was harmless, and in any event, certiorari would be inappropriate because petitioner's claim lacks broad importance and is not substantial, insofar as it rests upon the California Supreme Court's resolution of a factual question and application of California's Evidence Code.

II

CALIFORNIA'S DEATH PENALTY STATUTE

IS NOT VAGUE AS WRITTEN OR APPLIED

Petitioner claims that California's Death Penalty Statute is vague as written and applied in its failure to provide guidelines for the penalty decision in violation of the Eighth Amendment and Stringer v. Black, 503 U.S. ___, 112 S.Ct. 1130, 117 L. Ed. 2d 367. He argues that the California Supreme Court did not give careful consideration to the vagueness of three factors under California Penal Code § 190.3 which were used by the jury in making its penalty determination: factor (a), which refers to the circumstances of the crime; factor (b), which refers to petitioner's other violent criminal activity, and factor (i), which refers to the defendant's age. Petitioner concludes that the jury instructions were inadequate and the prosecutor's argument was inappropriate as to these three factors, and that the jury's penalty determination was therefore arbitrary and capricious. Petition at 10-14. Petitioner's assertions are meritless.

Petitioner's challenge to factors (a), (b), and (i) fails to warrant certiorari consideration because it does not present a substantial legal question requiring resolution by this Court. Moreover, the penalty determination was proper and just and was supported by appropriate aggravating factors.

First, as to the question of whether the jury was given guidance as to how to decide the criminality of other acts

committed by petitioner, the California Supreme Court reasonably explained that the trial court had no independent duty to instruct on the names and elements of crimes offered by the prosecution as to "other-crimes" under well-settled California law. For tactical reasons, defendants often do not want to risk highlighting prior violent crimes. The court also noted that petitioner was not prejudiced by the lack of an instruction describing or otherwise identifying prior violent crimes. Because of the convincing evidence of criminal conduct which was properly admitted under factor (b), there was no indication that an instruction on specific crimes and elements would have affected the outcome at trial. Tuilaepa, 4 Cal. 4th at 591-92, 842 P.2d 1142, 14 Cal. Rptr. 2d 340.

Regarding the question of whether factors (a), (b), and (i) were vague as written or applied, this assertion also has no merit. As to factor (b), which focuses the jury's attention on other crimes committed by petitioner involving his use or threatened use of force against another person, it is well settled that the "facts and circumstances of the defendant, his background, and his crime" are relevant to the sentencing decision. Clemons v. Mississippi, 494 U.S. 738, 748, 110 S.Ct. 1441, 108 L. Ed. 2d 725, 738 (1990). The state has broad latitude to decide how such facts are presented and considered at a penalty phase. Payne v. Tennessee, 501 U.S. ___, 111 S.Ct. 2597, 115 L. Ed. 2d 720, 735 (1991); Boyde v. California, 494 U.S. 370, 377, 110 S.Ct. 1190, 108 L. Ed. 2d 316, 326 (1990). It

is clear that the statute was not "vague" merely because the jury in the present case erroneously heard evidence of some prior acts inadmissible under factor (b). Factor (b) clearly directed the jury's attention to specific facts about petitioner. Although the California Supreme Court concluded that some evidence of unadjudicated acts of misconduct by petitioner were erroneously admitted under factor (b), obviously this does not render the statute itself unconstitutionally vague.

Further, petitioner's claim clearly lacks broad importance. The California Supreme Court concluded that notwithstanding some improper evidence of acts committed by petitioner, any error was harmless as "[t]he circumstances of the capital crime included defendant's attempt to kill four bar patrons in a gratuitous and cold-blooded manner. Admissible background evidence also showed a pattern of nonconforming and violent behavior, namely three assaults and the possession of potentially dangerous weapons while in custody." Tuilaepa, 4 Cal. 4th at 591, 842 P.2d 1142, 14 Cal. Rptr. 2d 340. Simply put, factor (b) is not "illusory" or "vague" under Stringer v. Black, 503 U.S. ___, 112 S.Ct. 1130, 117 L. Ed. 2d at 382, and the statute does not become vague merely because evidence was erroneously but nonprejudicially admitted under factor (b) to prove violent acts committed by petitioner.

Petitioner also claims that the age factor in California Penal Code § 190.3(i), is vague. Petition at 12-13. Certiorari should not be granted to consider his vagueness

challenge to factor (i) regarding petitioner's age at the time of the crime. Although mere chronological age by itself is irrelevant to the issue of penalty under California law, People v. Rodriguez, 42 Cal. 3d 730, 789, 726 P.2d 113, 230 Cal. Rptr. 667 (1986), either defense counsel or the prosecutor may argue age-related inferences which might "reasonably inform the choice of penalty." People v. Lucky, 45 Cal. 3d 259, 302, 753 P.2d 1052, 247 Cal. Rptr. 1 (1988). Here the prosecutor did not argue that petitioner's age in itself was aggravating, but merely argued, in anticipation of trial counsel's argument, that petitioner's age was not a mitigating factor.

Factor (i) was not impermissibly vague since it permitted argument only on "age-related matters suggested by the evidence or by common experience or morality. . . ." Lucky, 45 Cal. 3d at 303, 753 P.2d 1052, 247 Cal. Rptr. 1. The only requirement imposed upon the states is that the jury be allowed "to consider" the defendant's youth as a mitigating factor. See, e.g., Stanford v. Kentucky, 492 U.S. 361, 375, 109 S.Ct. 2969, 106 L. Ed. 2d 306 (1989); Lockett v. Ohio, 438 U.S. 586, 608, 98 S.Ct. 2954, 57 L. Ed. 2d 973 (1978); Thompson v. Oklahoma, 487 U.S. 815, 834, 108 S.Ct. 2687, 101 L. Ed. 2d 702 (1988); Johnson v. Texas, 509 U.S. ___, 61 U.S.L.W. 4738 (1993).

However, a mandate that the jury must be allowed "to consider" the mitigating force of a defendant's youth is not synonymous with a prohibition against the use, as aggravation, matters that interrelate case specific facts about the defendant

to his age, and certainly does not establish, as petitioner implies, a duty to order the jury to automatically accept a defendant's youth as a guaranteed factor in mitigation.

Lastly, factor (a), as to the circumstances of petitioner's crime, was not vague. Obviously jurors must exercise some subjective discretion. It would be impossible to have a totally objective penalty phase and, in fact, an automatic death scheme has been condemned as soundly as has an unbridled discretion scheme. See Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978, 49 L. Ed. 2d 944 (1976). The California Supreme Court properly explained in the present case: "[T]he individualized penalty determination required by the Eighth Amendment makes inevitable application of the sentencer's own values, perceptions, and experiences to the factors the state properly deems relevant. (Eddings v. Oklahoma (1982) 455 U.S. 104, 110-112 [102 S.Ct. 869, 71 L. Ed. 2d 1, 8-9].)" Tuilaepa, 4 Cal. 4th at 594, 842 P.2d 1142, 14 Cal. Rptr. 2d 340. The California Supreme Court held in People v. Proctor, 4 Cal. 4th 499, 551, 842 P.2d 1100, 14 Cal. Rptr. 2d 340 (1992): "The United States Supreme Court itself has established that the circumstances surrounding a capital offense constitute one of the criteria upon which the jury should base its penalty determination. (See, e.g., Penry v. Lynaugh (1989) 492 U.S. 302, 318 [106 L.Ed.2d 256, 277-278, 109 S.Ct. 2934]; Booth v. Maryland (1987) 482 U.S. 496, 502 [96 L.Ed.2d 440, 448, 107 S.Ct. 2529], overruled on other grounds in Payne v. Tennessee (1991) ___ U.S.

___ [115 L.Ed.2d 720, 111 S.Ct. 2597]; Jurek v. Texas (1976) 428 U.S. 262, 274 [49 L.Ed.2d 929, 939-940, 96 S.Ct. 2950] (plur. opn.). The high court has not stated or implied that the factor of the 'circumstances of the offense' is unconstitutionally vague."

Moreover, petitioner's claims of vagueness as a whole should be rejected. In California, the jury must find true an enumerated California Penal Code § 190.2 "special circumstance" to render a defendant death-eligible. Once this has occurred, a penalty phase trial is held in which both parties submit evidence on enumerated California Penal Code § 190.3 aggravating and mitigating factors, examine and cross-examine witnesses, argue before the penalty phase jury, and wherein the jury is instructed on the pertinent law. Cal. Penal Code §§ 190.2, 190.3. The jury is instructed to impose a sentence of life without the possibility of parole if the mitigating factors outweigh the aggravating factors and death if the contrary is true. Cal. Penal Code § 190.3.

In Stringer, supra, the Mississippi scheme provided for a sentencing phase once the defendant was convicted of capital murder. There, however, the jury could return a death verdict if it found at least one of eight statutorily-established aggravating factors that was not outweighed by any mitigating circumstances. Stringer, 117 L. Ed. 2d 367 at 375, 112 S.Ct. 1130, 117 L. Ed. 2d 367. In Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853, 100 L. Ed. 2d 372 (1988) a provision in an

Oklahoma statute identical to the Mississippi factor which involved a murder being "especially heinous, atrocious or cruel" was found to violate the Eighth Amendment. The core of the finding there was that the "especially heinous, atrocious or cruel" phrase failed to adequately inform juries "what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion which was held invalid in Furman v. Georgia, 408 U.S. 238 (1972)." Id., 486 U.S. at 361-62, 108 S.Ct. 1853, 100 L. Ed. 2d 372.

In California, however, the safeguards are such that the record readily demonstrates (1) what evidence both sides proffered as establishing a mitigating or aggravating factor, (2) what arguments were relied upon by each side to establish or disprove the existence of any factor, and (3) the instructions to the jury as to how to assimilate the above information. The procedure renders it impossible for the jury to be ignorant of the meaning of the mitigating and aggravating factors actually litigated in any given case.

Further, although Eighth Amendment vagueness analysis is appropriate in reviewing state statutes that govern "those circumstances that make a criminal defendant 'eligible' for the death penalty," Lewis v. Jeffers, 497 U.S. 764, 110 S.Ct. 3092, 3099 (1990), in California the "special circumstance" findings made prior to the penalty phase "adequately limit[ ] the death sentence to a small subclass of capital-eligible cases." Pulley v. Harris, 465 U.S. 37, 53, 104 S.Ct. 871, 79 L. Ed. 2d 29

(1984). After death-eligibility has been so limited, even "unbridled discretion" in the jury is permissible under the Eighth Amendment. Zant v. Stephens, 462 U.S. 862, 875-80, 103 S.Ct. 2690, 77 L. Ed. 2d 214 (1983). Thus, any "vagueness" in the statutory sentencing factors weighed by a California jury in exercising its discretion whether to impose death is not cognizable under the Eighth Amendment. See California v. Ramos, 463 U.S. 992, 1008 n.22, 103 S.Ct. 3446, 77 L. Ed. 2d 1171 (1982). The set of factors identified in § 190.3 of the California Penal Code provides sufficient guidance to the jury and lessens the chance of arbitrary application of the death penalty, by focusing attention on aggravation related to the defendant's personal history and by identifying relevant individualized mitigating circumstances. See Pulley v. Harris, 465 U.S. at 53, 104 S.Ct. 871, 79 L. Ed. 2d 29.

Petitioner cites this Court's grant of certiorari in Bacigalupo v. California, ___ U.S. ___, 113 S.Ct. 32, 121 L. Ed. 2d 5 (1992) on the question of vagueness. The Bacigalupo grant and remand does not support granting the instant petition. This Court remanded Bacigalupo for consideration in light of Stringer v. Black, supra. As previously noted, Stringer undertook vagueness analysis of an "aggravating factor" as defined in Mississippi's death-penalty statute, observing that "a vague aggravating factor used in the weighing process . . . creates a risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be by relying upon the

existence of an illusory circumstance." Stringer, 503 U.S. ___, 112 S.Ct. at 1139, 117 L. Ed. 2d 367. The factors cited by petitioner, specifically factor (a), regarding the circumstances of petitioner's crime, factor (b), regarding petitioner's other acts, and factor (i), regarding petitioner's age cannot be deemed "illusory" circumstances.

In Arave v. Creech, ___ U.S. ___, 113 S.Ct. 1534, 121 L. Ed. 2d ___ (1993), this Court held that an aggravating circumstance that the defendant exhibited "utter disregard for human life" as construed by the Idaho Supreme Court to refer to the "cold blooded, pitiless slayer" was not facially invalid. This Court explained that in light of Idaho's sentencing scheme, a sentencing judge reasonably could find that not all Idaho capital defendants are "cold-blooded." This Court reversed the decision of the Court of Appeals which had found that the special circumstance was unconstitutionally vague, as this Court concluded that in light of the consistent narrowing definition given the "utter disregard" circumstance by the Idaho Supreme Court, the circumstance was constitutional. Arave, ___ U.S. ___, 113 S.Ct. at 1536-37, 121 L. Ed. 2d ___.

Moreover, as pointed out earlier, the Mississippi "aggravating factor" functioned as a "narrowing" factor rendering the defendant death-eligible in the first place, the very kind of factor traditionally subject to vagueness analysis. In contrast, the California "aggravating factor" plays a role only after the "special circumstance" findings have rendered the defendant

eligible for the death penalty.

In summary, Stringer does not compel Eighth Amendment vagueness analysis of the aggravating and mitigating factors that guide a California capital jury's discretion in imposition of sentence. The California statute scheme is not unconstitutionally vague. There is no need to grant certiorari to consider petitioner's vagueness challenge.

III

PETITIONER'S DEATH JUDGMENT WAS NOT CONSTITUTIONALLY INVALID BECAUSE OF COURTROOM SHACKLING

Petitioner reiterates his claim, made in his first contention, that he was improperly shackled at trial. Petition at 15-17. This contention lacks broad importance such that certiorari is inappropriate. The court resolved the shackling issue on the independent state law ground that petitioner could not challenge the use of physical restraints at trial for the first time on appeal, having failed to object and make a record at trial and having thereby waived the claim.

Further, although the issue is before the California Supreme Court in a currently pending Petition for Writ of Habeas Corpus, the record on appeal simply did not establish that (1) the jury saw courtroom restraints, (2) the efforts of the court and counsel to conceal ankle shackles from the jury whenever petitioner appeared in court failed, or (3) any glimpse jurors may have had of restraints as petitioner entered the courtroom actually shocked them or affected their assessment of the evidence. See Tuilaepa, 4 Cal. 4th at 583-86, 842 P.2d 1142, 14 Cal. Rptr. 2d 340. Petitioner has wholly failed to show a violation of the Constitution or a substantial legal question warranting the grant of certiorari.

IV

PETITIONER'S CONCLUSORY CLAIM OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL DOES NOT WARRANT THE GRANT OF CERTIORARI

Petitioner briefly claims that his federal constitutional rights to due process, effective assistance of counsel, and to be free from an arbitrary and capricious death judgment were violated by the inadequate representation of trial counsel, who failed to protect petitioner from unwarranted and prejudicial shackling in front of the jury. Petition at 17-18. Again, as previously noted, the shackling issue does not warrant the grant of certiorari. Moreover, the California Supreme Court explained in this automatic appeal that the performance of trial counsel as to the use of courtroom restraints "could not possibly have affected the outcome at trial." Tuilaepa, 4 Cal. 4th at 583, 842 P.2d 1142, 14 Cal. Rptr. 2d 340. The court held:

> "Nothing in the record on appeal clearly establishes that the jury did or could see defendant's restraints. The court and counsel agreed that efforts had been taken to conceal defendant's ankle shackles from the jury whenever he appeared in court. Defendant's post-trial 'experiment' did not conclusively show efforts had failed. Defendant's version of events also implied, at most, that jurors might have seen him handcuffed and/or shackled in the

hallway of the courthouse and might have assumed such restraints were not removed during trial. However, the trial court made no findings in this regard and never credited defendant's account. In addition, defendant did not testify at any phase of trial and there is no indication he would have testified but for the restraints." People v. Tuilaepa, 4 Cal. 4th at 584, 842 P.2d 1142, 14 Cal. Rptr. 2d 340.

Petitioner has simply failed to show that any error by trial counsel on the issue of shackling constituted either deficient performance or prejudice, i.e., that there is a reasonable probability that, but for trial counsel, the result of the proceedings would have been different. Strickland v. Washington, 466 U.S. 668, 695-96, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984). Beyond that, again as noted earlier petitioner's claim lacks broad importance and does not articulate the kind of substantial legal question worthy of a grant of certiorari.[5]

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5. As pointed out in Argument I, petitioner's allegation of ineffective assistance of counsel currently is before the California Supreme Court in a pending Petition for Writ of Habeas Corpus, in which petitioner has gone beyond the "four corners" of the trial record and addressed, inter alia, the issue of courtroom restraints.

CONCLUSION

Petitioner presents no issue worthy of discretionary review by this Court. The Petition for Writ of Certiorari therefore should be denied.

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Respectfully submitted,

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